1992

State of Utah v. Kelly S. Barnhart : Brief of Appellant

Utah Court of Appeals

Philip L. Foremaster; Attorney for Appellant.
R. Paul Van Dam; Utah Attorney General; Attorney for Appellee.

IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	)	
Plaintiff/Appellee,	)	
vs.	)	Case No. 920357-CA
KELLY S. BARNHART,	)	
Defendant/Appellant.	)	Priority No. 2

BRIEF OF APPELLANT

Appeal from the Fifth Judicial District Court
of Washington County
Honorable James L. Shumate presiding

Phillip L. Foremaster #1103
247 Sugar Leo Road
St. George, Utah 84770-7944

Attorney for Appellant

R. Paul Van Dam
Utah Attorney General
236 State Capitol Bldg.
Salt Lake City, Utah 84114

Attorney for Appellee

IIA. DETERMINATIVE CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES, RULES AND REGULATIONS

Section 41-6-44 (Utah Code Annotated 1953 as amended): It is unlawful and punishable as provided in this section for any person to operate or be in actual physical control of a vehicle within this state if the person has a blood or breath alcohol concentration of .08 grams or greater as shown by a chemical test given within two hours after the alleged operation or physical control, or if the person is under the influence of alcohol or any drug or the combined influence of alcohol and any drug to a degree which renders the person incapable of safely operating a vehicle.

IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	)	
Plaintiff/Appellee,	)	
vs.	)	Case No. 920357-CA
KELLY S. BARNHART,	)	
Defendant/Appellant.	)	Priority No. 2

BRIEF OF APPELLANT

Appeal from the Fifth Judicial District Court
of Washington County
Honorable James L. Shumate presiding

Phillip L. Foremaster #1103
247 Sugar Leo Road
St. George, Utah 84770-7944

Attorney for Appellant

R. Paul Van Dam
Utah Attorney General
236 State Capitol Bldg.
Salt Lake City, Utah 84114

Attorney for Appellee

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes

Cases

IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	)	
Plaintiff/Appellee,	)	
vs.	)	Case No. 920357-CA
KELLY S. BARNHART,	)	
Defendant/Appellant.	)	Priority No. 2

BRIEF OF APPELLANT

I. STATEMENT SHOWING THE JURISDICTION OF THE APPELLATE COURT

The Utah Court of Appeals has jurisdiction in this matter pursuant to Section 78-2a-3(2)(f) Utah Code Annotated (1953 as amended).

II. STATEMENT OF ISSUES PRESENTED FOR REVIEW AND STANDARD OF REVIEW WITH SUPPORTING AUTHORITIES

POINT ON APPEAL: WAS THE DEFENDANT IN ACTUAL PHYSICAL CONTROL OF A MOTOR VEHICLE WHILE UNDER THE INFLUENCE OF ALCOHOL TO A DEGREE WHICH RENDERED HIM INCAPABLE OF SAFELY DRIVING A MOTOR VEHICLE AS DEFINED BY SECTION 41-6-44, UTAH CODE ANNOTATED (1953 AS AMENDED)?

STANDARD OF REVIEW: Under the existing facts, the trial court entered a finding that the Appellant was in "actual physical control" of a motor vehicle as set forth in the applicable statute (41-6-44 U.C.A.). The standard for appellate review of factual findings affords great deference to the trial court's view of the evidence unless the trial court has misapplied the law or its

findings are clearly against the weight of the evidence. Pagano v. Walker, 539 P.2d 452 (Utah 1975); Reed v. Alvey, 610 P.2d 1374 (Utah 1980). In addition, when a matter is presented to the trial court on stipulated facts, which are "the functional equivalent" of findings of fact, the appellate court will not defer to the trial court's findings. Dover Elevator Co. v. Hill Mangum Invests., 766 P.2d 424, 426 (Ut. Ct. App. 1988). Where the facts are not in material dispute, the interpretation placed thereon by the trial court becomes a question of law, which is not conclusive on appeal. Diversified Equities, Inc. v. American Sav. & Loan Ass'n, 739 P.2d 1133, 1136 (Ut. Ct. App. 1987).

III. STATEMENT OF THE CASE

On stipulated facts, the Defendant was convicted in Fifth District Court for Washington County of the offense of being in actual physical control of a motor vehicle while under the influence of alcohol to a degree which rendered him incapable of safely driving a motor vehicle in violation of Section 41-6-44, Utah Code Annotated (1953 as amended). (See attached Addendum). Defendant appeals claiming that he was not guilty of that offense under the facts existing in the case and under the law as defined by the aforementioned statute and the case law construing the same.

IV. STATEMENT OF THE FACTS

On March 24, 1992, sometime between the hours of 8:00 p.m., and 9:00 p.m. Appellant drove his girl friend Tamila's blue Buick automobile to the parking lot of Lin's AG (a supermarket) in St. George (Tr. 4). Appellant and his said girl friend had planned to meet at that point and time the previous day to do some shopping

(Tr. 4). Up to the time of arrival at the parking lot the Appellant had consumed two cans of 3.2 beer, apparently Budweiser by trade name (Tr. 4-5). The trial court, in its findings, found that only two cans of beer had been consumed by Appellant up to his arrival at the parking lot (Tr. 8).

Between his time of arrival at the parking lot and until the police subsequently arrived between 10:00 p.m. and 11:00 p.m. the Appellant consumed seven cans of beer while sitting in the automobile waiting for his girl friend to arrive (Tr. 5, 9). During this time, the vehicle was not moved from its original parking spot (Tr. 5), the keys were left in the ignition (Tr. 5, 8), the engine was cold (Tr. 5), and when the police arrived the Appellant was asleep in the driver's seat of the automobile with his head laying back (Tr. 5). The headlights of the vehicle were not on (Tr. 9) and the trial court specifically found that there was no evidence that the engine had been running for at least an hour prior to the time the police officer arrived (Tr. 9). The police had been called to the scene because the store owner and operator had become suspicious of the Appellant's motor vehicle parking for so long in his parking lot (Tr. 8).

After being arrested at the scene, the Appellant was given an intoxilyzer test of his blood alcohol and the test results were .18 (Tr. 10). Based upon this test result, the court specifically found that the Appellant was under the influence of alcohol to a degree that violated Section 41-6-44 U.C.A. at the time the police arrested him (Tr. 19). The court also found that the Appellant was unconscious at the time the officers appeared on the scene (Tr. 19),

that the Appellant was in the driver's seat at that time (Tr. 19), that in all likelihood the car's engine had not been running for in excess of an hour (Tr. 20), that the Appellant was the vehicle's sole occupant (Tr. 20), that the intent and plan of the Appellant and his girl friend was that she would drive the subject motor vehicle away (Tr. 20), that there was no intervening fact other than the alcohol itself prohibiting the Appellant from starting and moving the automobile (Tr. 20) and that there was no evidence to indicate that the Appellant was under the influence of alcohol to a degree that would violate the law at the time he drove the automobile to the parking lot (Tr. 20).

V. SUMMARY OF ARGUMENT

The facts, as stated and found by the trial court, do not support a conviction of violation of Section 41-6-44 U.C.A. as Appellant was not in "actual physical control" of the motor vehicle as defined by the statute and the case law construing the same.

VI. ARGUMENT

As is readily apparent, the problem in this case is determining if the Appellant was in "actual physical control" of a motor vehicle as described in the applicable statute (41-6-44 U.C.A.). The Utah case law has attempted to define this.

In State of Utah v. Charles Bugger, 25 Ut. 2d 404, 483 P.2d 441 (Utah 1971), the accused was in his automobile which was completely off the traveled portion of the highway with the motor not running. The accused was asleep at the time the officer arrived and the officer had some difficulty in awakening him.

The Utah Supreme Court determined that the accused was not in actual physical control of the motor vehicle as required by the statute and noted that "The defendant at the time of his arrest was not controlling the vehicle, nor was he exercising any dominion over it."

A different decision was arrived at in Garcia v. Schwendiman, 646 P.2d 651 (Utah 1982). In the Garcia case, the accused was in his motor vehicle attempting to start its motor. At the front of the Garcia motor vehicle was a fence preventing it from moving forward and a third person had positioned his own vehicle to the rear of the Garcia's vehicle so it could not be moved to the rear. The Utah Supreme Court stated that "...under the facts before us, where a motorist occupied the driver's position behind the steering wheel, with possession of the ignition key and with the apparent ability to start and move the vehicle, we hold that there has been an adequate showing of actual physical control under our implied consent statute." The court went on to say that the fact that Garcia could not move his automobile because of a fence in front and a vehicle to his rear did not alter its opinion.

The Utah case of Lopez v. Schwendiman, 720 P.2d 778 (Utah 1986), contains a little different fact situation. The officer found Lopez in his pickup parked by a public telephone booth adjacent to Sunnyside City Hall at 3:00 a.m. The truck's motor was not running but there were vehicle tracks from the truck in the freshly fallen snow. Lopez was sitting in the driver's seat with his head resting on the steering wheel. When the door to the truck was opened Lopez fell out of the truck and the officer had to catch him. Lopez smelled of alcohol and was "drooling", had very poor

balance and needed support to stand. The officer removed the keys from the truck's ignition and had to turn them to get them out.

At the time of the arrest, Lopez, in answer to a question, asking him if he was driving, stated "...I was waiting for a phone call." Later at trial, Lopez stated his wife had been driving when the battery died. He was just waiting for her to bring a car to tow the truck home.

The trial court found that Lopez was in actual physical control of the vehicle and the Utah Supreme Court agreed. In reaching its decision, the Supreme Court stated that "The trial court here found that there were tire tracks leading up to the vehicle, that the vehicle had to have reached its point of rest apparently on its own power and that Lopez had failed the field sobriety tests." By implication, it appears both the trial court and the Supreme Court were convinced that Lopez had driven the automobile to the point of arrest and done so while under the influence.

In Richfield City v. Walker, 790 P.2d 87 (Ut. Ct. App. 1990), the defendant, in the early morning hours of June 30, 1987, drove to the Richfield Quality Inn seeking a room. After being informed that there were no vacancies, he returned to his truck in the parking lot and went to sleep. Subsequently, he was discovered by a Sevier County Sheriff who found defendant's truck with the engine off and the headlights on. The doors were unlocked and the keys were in the ignition. Defendant was asleep on the seat, with his head toward the passenger door and a blanket over him. Within thirty minutes of his arrest, defendant submitted to an intoxilyzer test that registered his blood alcohol level at .21%.

In the Walker case, the Utah Court of Appeals stated that it must look to the totality of the circumstances to determine whether defendant was in actual physical control of his vehicle. The court cited State v. Bugger, in stating that an intoxicated motorist asleep in his car was no in actual physical control of his vehicle. It also called the Bugger fact situation "meager". The Court of Appeals then went on to talk about the positioning of the defendant in the driver's seat as being a common element to all of the cases that have found actual physical control of a motionless vehicle but then added that "...positioning in the driver's seat is a significant but not necessarily the determining factor in ascertaining actual physical control."

The Court of Appeals also stated in Walker that the possession of the ignition key and the ability to start and move the vehicle are relevant factors.

Further, and important to this case, the court in Walker stated that "How the car got to its present resting place is an additional critical factor."

The Utah Court of Appeals in Walker then went on to talk about the placing of the ignition keys in the automobile as being in actual physical control of the motor vehicle and cited the Florida case of Fieselman v. State, 537 So. 2d at 603. The Court of Appeals quoted the Fieselman case as saying "...a reasonable inference can be drawn that Fieselman, while intoxicated, placed the keys in the ignition and thus was at least at that moment in actual physical control of the vehicle while intoxicated." In Walker, the Utah Court of Appeals, in referring to the quoted statement in Fieselman stated "We believe that such an inference can be drawn since a

person who has placed keys in the ignition of a vehicle may be as much in actual physical control of the vehicle as a person seated behind the wheel of the vehicle."

After some discussion of the fact that the keys were in the ignition of the subject vehicle, the Utah Court of Appeals went on to state in Walker that "Lastly, we point out that evidence that the key was in the ignition does not inexorably lead to the conclusion that the defendant was in actual physical control of the vehicle."

If counsel for Appellant is understanding the cases correctly, it appears that what the appellate courts are saying, in attempting to make a determination of "actual physical control", is that there is no particular fact to be considered as determinative of the issue but all facts must be looked at in their totality.

In this case, there is no evidence that the Appellant was intoxicated at the time he parked his vehicle in the Lin's AG parking lot. Because of this, it must be presumed that he was not intoxicated at that time. Thus, his leaving the ignition keys in the ignition at the time of parking was an act or failure to act made by the Appellant while he was not intoxicated.

While the stipulated facts are that at the time the officer arrived at the scene the Appellant was asleep in the driver's seat, there is no evidence that he ever touched any of the operating controls of the vehicle during the time he was seated in the automobile drinking. Further, the trial court specifically found with no objection from the prosecutor, that the intent of the Appellant was to have his girl friend move the automobile from the scene.

In Richfield v. Walker, the Utah Court of Appeals found the defendant to be in actual physical control of his vehicle. It is to be pointed out, however, that facts indicated that the defendant drove the vehicle to its position in the Richfield Quality Inn parking lot while in an intoxicated condition. As the court said, "To focus exclusively upon the fact that the driver was not sitting in the driver's seat or that he was asleep and to ignore other relevant factors, as the defendant would have us do, is illogical."

The legislature and all of us are concerned that the drinking drivers be kept off the road and the highways and the use be kept as safe as possible. On the other hand, there are certain necessary and proper uses of the automobile that should not be excessively interfered with. For instance, one can envision a situation when a person under the influence leaves a bar in the middle of a cold winter night, gets in his car for purposes of sleeping as he cannot move it because of his condition, starts the engine to run the heater to keep warm while he is sleeping, makes no other moves to move the vehicle, goes to sleep, and is subsequently arrested by an officer for being in actual physical control. While some may consider the officer's actions in this regard proper, the only alternative the poor sole that was asleep in his warm automobile may have is to freeze to death in the cold.

Somewhere a proper balance should be struck. Appellant believes it is his case in which such balance should be found.

VII. CONCLUSION

Taking into account all the circumstances in their totality it is Appellant's position that his conviction for being in actual

physical control of a motor vehicle to a degree that violates the law should be reversed.

RESPECTFULLY SUBMITTED this 30th day of September, 1992.

Phillip L. Foremaster
Attorney for Defendant/Appellant

CERTIFICATE OF MAILING

I hereby certify that I mailed four true and correct copies of Appellant's brief, postage pre-paid on this 30 day of September, 1992, to Paul Van Dam, Utah Attorney General, 236 State Capitol, Salt Lake City, Utah 84114.

Phillip L. Foremaster

ADDENDUM

Ex 66 67 +

Addendum attached to Appellant's Brief
State of Utah v. Kelly S. Barnhart
Case No. 920357 - CA

FILED
FIFTH DISTRICT COURT
'92 MAY 11 AM 10 24
WASHINGTON COUNTY
BY COURT

FIFTH DISTRICT COURT
WASHINGTON COUNTY, STATE OF UTAH

STATE OF UTAH
VS

JUDGMENT, SENTENCE
(COMMITMENT)

BARNHART, KELLY S
1660 W SUNSET
G-1
ST GEORGE UT 84770

CASE NO: 925500799
DOB: 05/21/62
TAPE: 920263COUNT: 2740
DATE: 05/04/92

THE ABOVE NAMED DEFENDANT BEING ADJUDGED GUILTY FOR THE OFFENSE(S) AS FOLLOWS:

Charge: 41-6-44 DRIVING UNDER THE INFLUENCE OF ALC/DRUGS
Plea: Not Guilty Find: Guilty - Bench
Fine: 900.00 Susp: 0.00
Jail: 60 DA Susp: 50 DA ACS: 0

FEES AND ASSESSMENTS:

Fine Description: Fine- Prosecutor Spl					
Credit:	0.00	Paid:	0.00	Due:	486.49
Fine Description: Surcharge - 85%					
Credit:	0.00	Paid:	0.00	Due:	413.51
TOTAL FINES AND ASSESMENTS:					
Credit:	0.00	Paid:	0.00	Due:	900.00

TRACKING:
Other 06/30/92

CALENDAR:
REVIEW HEARING 05/27/92 01:30 PM in rm D with SHUMATE, JAMES L.

DOCKET INFORMATION:

Chrg: DUI Plea: Not Guilty Find: Guilty - Be
Fine Amount: 900.00 Suspended: .00
Jail: 60 DAYS Suspended: 50 DAYS

ONE YEAR PROBATION
1. 60 DAYS JAIL/50 STAYED/ 10 IMPOSED BEGIN 5-8-92 AT 6 PM
2. $900 FINE DUE 6-30-92 @ $100 MONTH
3. COMMIT NO VIOLATIONS
4. DRINKING DRIVING COURSE IMPOSED

UPON FILING OF NOTICE OF APPEAL, COURT WILL ISSUE CERTICATE OF PROBABLE CAUSE TO STAY IMPOSITION SNT. COURT GRANTS 20 DAY STAY OF SNT UNTIL JUDGMENT SUBMITTED. PAPER REVIEW IS SET FOR 5-27-92 1:30 PM- NO APPEARANCE NECESSARY IF APPEAL HAS BEEN FILED

REV scheduled for 05/27/92 at 0130 P in room D with JLS

BY THE COURT

JUDGE, ~~CIRCUIT~~ District COURT

NOTE: APPEAL MUST BE FILED WITHIN 30 DAYS OF ENTRY OF THIS JUDGMENT.